Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

HAROLD E. DOLEY AND DOLEY SECURITIES, INC.,

Petitioners,

V.

WINSTON & STRAWN LLP,

Respondent,

On Petition for Certiorari to the United States Court of Appeals for The District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The D.C. Bar provides for the mandatory arbitration of fee disputes before a board of trained attorney and non-attorney arbitrators. Arbitration rules expressly allocate the burden of proof of the reasonableness of the fee to the attorney and provide an obligation to advise the client of any development that "renders an earlier estimate substantially inaccurate." Before this court are the following issues:

Whether the court erred in finding that filing a response to a complaint in the form of a motion to dismiss and for a more definite statement was a waiver of the defendant's right to compel a fee dispute arbitration of an attorney under Rule XIII of the District of Columbia Bar Rules and the consumer protections it provides?

Whether or not the court erred in granting a motion for summary judgment where there was an issue of fact as to which fee in a range of fees stated was agreed to by the parties to the agreement.

List of Parties

1. HAROLD DOLEY, Defendant and Petitioner;
2. DOLEY SECURITIES INC. , Defendant and Petitioner; and
3. WINSTON & STRAWN, LLP, Plaintiff and Respondent.

Corporate Disclosure Statement

Doley Securities, LLC, is wholly owned by the Doley Foundation, LLC.

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II. Review Is Warranted Because The Opinion Of The District Of Columbia Conflicts with This Courts Holding in *AT & T Techs, v.*

Commc'ns Workers, 475 U.S. 643, 650 (1986)

III. Review is warranted because the District Of Columbia Circuit improperly held that the Respondent waived it's right to have its fee dispute arbitrated by filing a motion to dismiss.

IV. Review is warranted because the District Court failed to apply the state law governing lawyers which compels them to submit to mandatory arbitration of fee disputes whenever the clients demands such.

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Petition for a Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinion and Judgment Below

The District Court's opinion is reported as 654 F. Supp. 2d 17, (D.D.C. 2009), U.S. Dist. Lexis 84783 (D.D.C., 2009) and reprinted in Appendix, A-7. The court of Appeals unpublished Memorandum Opinion order is unofficially reported at 2010 U.S. App. Lexis 11911 and reprinted in Petitioner's Appendix, A-3.

Statement of Jurisdiction

The District Court has jurisdiction under 28 U.S.C. Art. 1331. The Court of Appeals issued its judgment on June 8, 2010. This Court has jurisdiction under 28 U.S.C. Art. 1254(1).

Statutory and Constitutional Provisions Involved

Relevant provision of American Bar Association requirements is referenced.

28 U.S.C. 1291 provides for de novo judicial review in the U.S. Court of Appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the court erred in finding that filing a response to a complaint in the form of a motion to dismiss and for a more definite statement was a waiver of the defendant's right to compel a fee dispute arbitration of an attorney under Rule XIII of the District of Columbia Bar Rules and the consumer protections provided therein?

Whether or not the court erred in granting a motion for summary judgment when there was an issue of fact as to which fee in a range of fees stated was agreed to by the parties to the agreement?

STATEMENT OF THE FACTS OF THE CASE

The appellant entered into an agreement with the appellee to provide legal representation in reference to a subpoena before an administrative agency. The agreement specified a specific fee for the law partner and a range of fees for those who may work on the case. The appellant paid $10,000.00 as a retainer for the legal service.(A-39) Throughout the course of their relationship no accounting was ever made of how the retainer fee was applied. Also, there was no credit given on the bills until after the law suit was filed. Declaration of Harold E. Doley, A-30; Declaration of Allen Counts, Esq. A-33; Invoices of Winston & Strawn, A-41, A-42, and A-43. Three bills were presented by the appellee. Each was disputed and rejected by the appellant. The appellee apologized and explained it was an accounting error. The same bills were presented, each bill failed to reflect an accurate accounting. (Affidavit of Allen Counts, General Counsel for the appellant). A-33 (para 2).

The appellee having never provided a correct bill filed suit in the United States District Court for the District of Columbia. The appellant filed a motion to dismiss and for a more definite statement. A-68 The motion stated that the contract was indefinite as to the range and not a contract. The motion also asked, in the alternative, for a more definite statement. After a hearing on the motion the court ruled, in a light more favorable to the non-moving party, denying the motion. Thereafter, appellant filed a motion to stay the proceeding, pending arbitration before the District of Columbia Bar Attorney Client Arbitration Board. A-78. In a hearing on the motion,

the court ruled that by filing a motion to dismiss and/ or for a more definite statement the appellant waived his right to have arbitration. Citing *Kahn v. Parsons Global Servs.* 521 F. 3d 421 (DC Cir. 2008) and other cases, the court, from the bench, accepted the argument of the appellee.A-7. The court was aware that the facts were different in this case and the *Kahn* case. In *Khan,* a motion for summary judgment, which sought a merits decision, constituted a waiver of the right to arbitrate. The court ignored the argument of the appellant that a motion to dismiss or for a more definite statement did not seek a merits decision which would waive the right to compel arbitration. The court went on to determine that the contract was not ambiguous but definite despite the indefinite range of fees, not specifically agreed upon. The Court also determined that there was no genuine issue of material fact, and as a matter of law, the appellants, were required to pay whatever hourly fee range the appellee chose. A-8. The appellant appealed. A-3.

THE FILING OF A MOTION TO DISMISS AND/ OR FOR A MORE DEFINITE STATEMENT IS NOT A WAIVER OF THE RIGHT TO ARBITRATE THE LEGAL FEE DISPUTE UNDER RULE XIII.

This case is in essence a legal fee collection matter brought against the appellants. In *Hercules & Co. v. Shama Restaurant*, 566 A.2d 31 (D.C. 1989), an order was issued staying that case to allow for arbitration before the District of Columbia Bar Attorney Client Arbitration Board. District of Columbia Bar Rule XIII (A-108) provides that an

attorney who is a member of the District of Columbia Bar "shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client . . . if a substantial portion of the services were performed by the attorney in the District of Columbia, or if the services included representation before a District of Columbia court... The arbitration provided under this rule shall be final and binding on the parties according to applicable law." *Bolton v. Bernabei & Katz, PLLC*, 954 A.2d 953 (D.C. 2008), *Schwartz v. Chow*, 867 A.2d 230 (D.C. 2005).

"Upon a finding of the existence of an enforceable arbitration clause, a presumption in favor of arbitration attaches." *Lopata*, 735 A.2d at 936. This presumption "is essentially a generalized inference of the parties' intent; courts will presume that an arbitration clause agreed upon by the parties was intended to foreclose judicial involvement in their disputes." *Friend v. Friend*, 609 A.2d 1137, 1139 (D.C. 1992). On the other hand, because "arbitration is a matter of contract. . . a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). In navigating the gulf between the judicial presumption in favor of arbitration that derives from the existence of an agreement to arbitrate, and the reluctance to force an unwilling party into unconsented arbitration, the Supreme Court has counseled:

[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

AT & T Techs, v. Commc'ns Workers, 475 U.S. 643,650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quoting *Steelworkers*, 363 U.S. at 582-S3, 80 S.Ct. 1347); *accord Carter v. Cathedral Avc. Coop., Inc.*, 566 A.2d 716, 717 (D.C. 1989). Therefore, the presumption in favor of arbitration arises only when the court has found that the parties have agreed to submit *some* disputes to arbitration. *See AT & T Techs.*, 475 U.S. at 650, 106 S.Ct. 1415. If the arbitration clause can reasonably be interpreted as including the dispute at hand, the presumption — unless rebutted — will lead the court to order it to be resolved through arbitration, and it is precisely in cases where the court must interpret an ambiguous clause that the presumption becomes operative. *See Masurovsky v. Green*, 687 A.2d 198, 202 (D.C. 1996).

On the other hand, if the court has "positive assurance" that the parties did not intend the dispute *sub judice* to be resolved through arbitration, then the court may not compel arbitration, because to do so would be contrary to the parties' agreement. *See AT & T Techs.*, 475 U.S. at 650, 106 S.Ct. 1415; *Steelworkers*, 363 U.S. at 582-83, 80 S.Ct. 1347; *Davis*, 215 U.S.App. D.C. at 122, 667 F.2d at 165 ("Parties to such an agreement cannot be required to

submit to arbitration any matter that they did not agree would be subject to that manner of dispute resolution."). Determining the scope of an agreement to arbitrate, like other issues of contract interpretation, is one that this court undertakes *de novo*. *Masurovsky*, 687 A.2d at 202 (citing *Haynes v. Kuder*, 591 A.2d 1286, 1289 (D.C. 1991)).

The Court of Appeals of the District of Columbia enacted its Rule VIII after the American Bar Association issued its McKay Report in 1992. In effect, the rule was adopted, approved and accepted by all D.C. lawyers, that they agree to submit to arbitration fee disputes with their clients. The appellee is bound by this mandatory arbitration rule. Proffering an interpretation that the appellant waived such right by responding to appellee's complaint with a motion to dismiss and/or for a more definite statement is not a valid argument. It should be noted that when the motion to dismiss or for a more definite statement was denied, the court gave time to the appellant to file its motion to stay the proceeding. A-75. The cases cited by the appellee did not relate to Rule XIII. The lawyers in the District of Columbia agreed and that they are required to arbitrate fee disputes if the client wishes before the Attorney/Client Arbitaration Board (ACAB).

Those rules provide adjudication before both lawyers and non-lawyers (Rule 1)(A-109); coordination with other dispute-resolving agencies (Rule 4); burden of proof regarding the reasonableness of the fees (Rule 19(f)(A-113); and an obligation on the attorney to advise the client of developments in the matter that "renders an earlier estimate substantially inaccurate" (Rule 20(f)(A-117) and the rate charges

by other attorneys in the district of Columbia providing similar legal services (Rule 20 (h)(iii))(A-117) The cases cited by the appellee are distinguished from this proceeding because the appellant never waived its right to arbitrate. Also, the argument that the motion to dismiss and/or for a more definite statement cannot be considered a waiver.

The complaint stated that the appellant refused bills which the client alleges were never prepared properly, failed to reflect payments made and absent mutual assent as to fees for other associates and partners. The motion to dismiss and/or for a definite statement was to clarify what was the cause of action. It was denied because the court is bound to rule on such motions in a light most favorable to the non-moving party. The motion to stay pending Arbitration was the next step. For over a year the appellee never cooperated with the appellant. The appellee refused to send a correct bill. The three bills never reflected the $10,000.00 retainer. Instead the appellee, knowing the credit sensitivity of the appellant, filed suit to damage and intimidate the appellant. Only after the suit (A-95) was filled did the appellee give the appellant credit for the $ 10,000.00, but without showing how it was applied. The appellee could have, at any time, sought to arbitrate this dispute, but did not. The suit itself is in bad faith, oppressive and deceptive. The right to arbitrate was not waived by the motion to dismiss and/or for a more definite statement.

THE COURT ERRED IN GRANTING A MOTION FOR SUMMARY JUDGEMENT.

Under Rule 56 of the Federal Rules of Civil Procedure, a summary judgment motion may be granted only upon a showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The court must examine the verified complaint, answers to interrogatories, depositions and affidavits, to determine whether there were any genuine issues of material fact.A-25, A-29, A-41. *District of Columbia v. Gray*, 452 A.2d 962, 964 (D.C. 1982). "We construe these materials in the light most favorable to the non-moving party, resolving in that party's favor any doubt as to the existence of a factual dispute". *Swann v. Waldman*, 465 A.2d 844, 846 (D.C. 1983).

THERE IS A MATERIAL ISSUE OF FACT THAT NEEDS TO BE DETERMINED.

This case arises from allegations made by the Law firm of Winston & Strawn, LLP, that the defendants owe plaintiff $84,412.19 for legal assistance for one deposition taken by the Office of Thrift Supervision on July 18, 2007. The plaintiff suggests that a document signed on April 19, 2007 was a contract which the defendants breached. The contracts was indefinite as to the specific hourly rates that would be charged by firm attorneys and legal assistants. Rather, it specified a broad range of possible fees to be charged. The affidavit of Harold

Doley stated that he and Mr. Buchanan agreed that he was required to pay the lowest fee in the range set forth therein in the contract. The affidavit (A-29) clarifies that the appellee did not have discretion to pick which fees in the range to be charged.

Mr. Buchanan states in his affidavit (A-56, para. 8; and corrected Affidavit A-106) that prior to the contract he and Mr. Doley agreed to Mr. Mancusi's fee rate of $480 per hour. He states "That Doley told Buchanan and Mancusi that he understood and accepted the fees and cost that were associated with W&S's Legal Work." Mr. Doley states that he agreed to pay only the lowest range of fees listed in the contract. The fact that after the preliminary discussion the range of fees were listed rather than a stated fee for Mr. Mancusi, verifies Mr. Doley's position. This is a material issue of fact which must be determined by a fact finder. The difference between the lower fees and the fees arbitrarily set by the appellee and charged to the appellant is substantial. Parol evidence would have been admissible to prove the disputed issues of fact. The D.C. Attorney Client Arbitration Board (ACAB) places the burden of proof clearly on the attorney (Rule 19(f)(A-113) not the client—as ruled by the District Court. The attorney, before the ACAB, has to demonstrate informing the client of any "development occurring during the representation that renders an earlier estimate substantially inaccurate" (Rule 20(f)(A-117). The ACAB has expert knowledge of the customary hours expended and fees charged for similar one day administrative proceedings and has primary jurisdiction (compare Far East Conference v. United States, 342 U.S. 570

(1952) to determine the "reasonableness" of the charges in the District of Columbia (Rule 20(h)) and approved by D.C. Judges for attorneys practicing in the District of Columbia.

THE DEFENDANT'S BILL NEVER REFLECTED A CREDIT FOR THE $ 10,000 BEFORE THE SUIT WAS FILED.

The attorney for plaintiff stated that plaintiff gave the defendant a credit for the $10,000 payment before the suit was filed. No such credit was given. All the bills fail to reflect the payment of the $10,000. (see affidavit of Alan Counts Board Chairman of Defendant's Corporation). A-34. Also according to the affidavit of Alan Counts the bills were never acknowledged as the correct bills. Essentially no correct bill was ever presented. A trial of the question of whether or not a correct bill was ever presented is necessary to arrive at the true value of the service offered. There has never been a discussion by the parties of a correct and proper bill.

In consideration of the affidavit of Mr. Buchanan (A-54) and Mr. Doley, (A-28) a trial should have been set. The question to be determined is whether or not Mr. Doley agreed to pay whatever fee set within the range offered in the contract by Mr. Buchanan or to pay only the lowest fee set in the range. The other question to be determined is whether or not a correct bill was ever sent, acknowledged by the appellant to be correct.

The court erred by not following District of Columbia Bar Rule XIII which requires mandatory arbitration

by an attorney who is a member of the District of Columbia Bar.

In conclusion the Court made an error in not allowing the appellant his right to have the legal fee dispute arbitrated by the panel of experts so designated by the D.C. Bar for such disputes. The ACAB allocates the burden of proof to the attorney (ACAB, Rule 19(f)) and requires notice of developments (ACAB, Rule 20 (f)) that in effect increased ten–fold--the estimate relative to the value of the retainer.

We ask this Court to remand the case to the District Court with the instruction that the fee dispute be arbitrated at the request of the client. To do otherwise would undo the work of the American Bar Association and its effort to have better relations with clients.

For these reasons, this Court is requested to grant certiorari for this petition.

Respectfully submitted,

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